Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-2091

IN THE

Supreme Court of the United States

October Term, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

PAT J. BUCHANAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Pat J. Buchanan (hereafter "Buchanan") respectfully submits the following response to the petition of Union Oil Company of California (hereafter "Union Oil") for the issuance of a writ of certiorari to review a decision of the California Supreme Court entered on March 27, 1986.

STATEMENT OF THE CASE

A. The Facts.

In its petition, Union Oil has painted an inaccurate picture of the case herein by omitting a major portion of the allegations of Buchanan's cause of action for intentional infliction of emotional distress. The main thrust of that cause of action is that Union Oil ratified, condoned and acquiesced in a campaign of harassment perpetrated upon Buchanan by her fellow workers, three of whom are named as co-defendants. While Buchanan's complaint sets forth certain acts by the supervisory personnel of Union Oil [quoted by Union Oil at page 4 of its petition], which arguably may fall under the collective bargaining agreement, the gravamen of Buchanan's complaint is set forth in the following allegations which Union Oil omitted:

> "At all times mentioned herein, and ever since approximately May 8, 1979, and continuously thereafter to on or about July 16, 1982, defendants, and each of them, with the knowledge, permission and consent of each and every other defendant, including defendant UNION OIL, and its supervising personnel, conspired to and have acted in concert and individually, to vex, harass, annoy, demean, and otherwise improperly interfere with plaintiff's contract of employment with defendant, UNION OIL, and with the performance of plaintiff's duties of employment, with the object and intent to force or cause plaintiff to suffer humiliation, mental anguish and emotional distress, and to cause plaintiff to resign her position of employ-

ment or to be fired or dismissed therefrom, as more specifically appears hereinafter."

[The paragraphs quoted by UNION OIL in its petition, at page 4, are incorporated herein by reference.]

"(b) Acts and conduct of co-employees: Constant vandalism of plaintiff's personal locker, theft of plaintiff's personal property and tools, destruction of plaintiff's personal property, ruining both pairs of plaintiff's work boots by filling them with pipe dope, false statements regarding plaintiff's activities and character, tampering with plaintiff's log entries, threats of physical violence, slandering, defaming and demeaning plaintiff at every and all opportunities, and many other acts designed to discredit plaintiff in the eyes of the employer.

"All such acts were done by defendants, and each of them, with the object and intent of harassing plaintiff and for the purpose of forcing her to leave her employment, and at all times mentioned herein, defendants, and each of them, wilfully engaged in the acts and conduct aforesaid with the express purpose of discriminating against plaintiff because of her sex.

"At all times mentioned herein, plaintiff continually and on a regular basis complained to defendant IUPIW and to defendant, UNION OIL, by and through its supervisory personnel, including defendants, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them, about the aforesaid acts and conduct; said

defendants, and each of them, failed to take appropriate actions to insure that plaintiff would not continue to be subjected to such wrongful acts and conduct.

"By failing to check the aforesaid acts and conduct, despite plaintiff's repeated pleas and complaints, defendants, IUPIW, UNION OIL, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them, ratified and condoned said wrongful acts and said acts are imputed to said defendants, IUPIW, UNION OIL, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them.

"The aforesaid acts of defendants, and each of them, are and amount to outrageous conduct.

"Plaintiff, as a woman, and particularly as the only woman employed on Platform Eva, was particularly susceptible to emotional distress as a result of the outrageous acts and conduct of defendants, and each of them.

"As a direct result of the campaign of harassment perpetrated by defendants, and each of them, plaintiff became fearful for her personal safety, and suffered such nervous, mental and emotional distress that she was required to seek medical attention and on March 17, 1982, was required to go on medical disability leave. On or about July 16, 1982, and while plaintiff was on medical disability leave, plaintiff was terminated from her employment by defendant, UNION OIL."

Union Oil has conveniently quoted only a minor part of Buchanan's cause of action so as to give the impression that all of the facts underlying Buchanan's claim for intentional infliction of emotional distress relate to acts grievable under the collective bargaining agreement. On the contrary, the main thrust of Buchanan's cause of action concerns intentional and tortious acts of her co-workers, which conduct is outside the scope of the collective bargaining agreement, and which conduct Buchanan alleges the supervisory personnel at Union Oil condoned and ratified. Buchanan's tort allegations are not founded on a breach of the collective bargaining agreement and are not "inextricably intertwined" with rights and obligations established by the contract.

B. Proceedings Below.

On March 23, 1984, the superior court entered a stipulation, jointly filed and agreed to by Union Oil and Buchanan, to voluntarily dismiss from the Complaint, with prejudice, the supervisory employees of Union Oil named as co-defendants. Union Oil, by omitting a portion of that stipulation, gives an inaccurate picture of the proceedings below.

In dismissing the supervisory employees, Union Oil stipulated that the supervisors were acting as agents on behalf of Union Oil and that their acts and conduct were imputable to Union Oil. *Appendix "1"*.

OPPOSITION TO GRANTING THE WRIT

A. BUCHANAN'S TORT ACTION DOES NOT REQUIRE INTERPRETATION OR ADJUDICATION OF THE COLLECTIVE BARGAINING AGREEMENT AND THEREFORE IS NOT PREEMPTED.

Contrary to Union Oil's assertion, the application and interpretation of the collective bargaining agreement are not at the core of Buchanan's claim for intentional infliction of emotional distress.

Buchanan's claim for intentional infliction of emotional distress arises out of a campaign of harassment by her co-workers, tortious conduct outside the scope of the collective bargaining agreement. Although Buchanan does complain of several specific acts of supervisors [which Union Oil asserts are Buchanan's sole allegations], her main complaint against Union Oil is that she repeatedly brought to the attention of supervisory personnel the harassment she was experiencing and that Union Oil, by its inaction, ratified and condoned the objectionable conduct of her co-workers.

Union Oil seeks to capitalize on Buchanan's termination, which she did not grieve, [and which has been found to be pre-empted], as the source of her emotional distress. On the contrary, Buchanan's emotional distress arose from a course of conduct for a period of a year or more prior to her termination and would have been actionable even if Buchanan had not been discharged. Buchanan's involuntarily termination came while she was on disability leave for treatment of her emotional distress.

Union Oil's reliance on *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983), as the

appropriate test to detemine preemption, appears to be misplaced. *Beers* involved a case coming under the Railway Labor Act which provides that the provisions of the Act are the exclusive remedy for workers covered by that Act, thus excluding any state claims. Buchanan's employment was not covered by the Railway Labor Act and therefore the *Beers* analysis s is inappropriate in this instance.

Union Oil additionally relies heavily on the more recent case of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. __, L.Ed.2d 206, 105 S.Ct. 1904 (1985), which provided that when resolution of a state-law claim is *substantially* dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a section 301 claim or dismissed as preempted by federal labor-contract law. (Emphasis added.) Clearly, Buchanan's complaint of emotional distress arising out of a campaign of harassment by her fellow employees is not founded on a breach of the collective bargaining agreement and is not "inextricably and intertwined" with rights and obligations established by the contract, and is not grievable thereunder. (*Allis-Chalmers Corp. v. Lueck, supra.*)

B. BUCHANAN'S CAUSE OF ACTION IS NOT PREEMPTED UNDER EITHER THE *GARMON-FARMER* BALANCING TEST OR THE *LUECK* UNIFORMITY TEST.

Courts have traditionally followed the preemption analysis first described in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, and further developed in the area of labor law in *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290, 97 S.Ct. 1056 (1977). This test is based on a

balancing (weighing) of competing Federal and State interests, if any, in governing the conduct involved in the case. If the State claim involves matters of merely peripheral concern to the Federal Act or involves matters "sufficiently deeply rooted in local feeling," the State claim is not preempted.

In *Farmer, supra*, this Court was presented with the same preemption issue under a California action for intentional infliction of emotional distress. Applying the *Garmon* test, the Court held that the California state action for intentional infliction of emotional distress was not preempted by Federal Labor Law. The Court held that said action was deeply rooted in local feeling and concluded the State's interest in protecting the health and well-being of its citizens outweighed any peripheral concern to the Federal Act.

The second test recently described in *Allis-Chalmers v. Lueck, supra*, looks to the need for uniformity which underlies the doctrine itself. Under this test, if the state action is inextricably intertwined with consideration of the terms of the labor contract to define the meaning of the contract relationship, then the state claim is preempted. The Court applied this test to preempt a state law tort action for bad faith in the handling of a disability insurance claim filed by a union employee under an employer-provided health plan governed by the collective bargaining agreement.

In holding that the state action was preempted, the Court emphasized the need for uniformity in interpretation of disability insurance policies that derived from a collective bargaining agreement. However, the Court noted that its holding was one of "narrow focus," and reiterated the long-standing rule that not every state law claim asserting a right that relates in some way to a provision in a collective

bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted under the Labor Management Relations Act.

The very argument advanced by Petitioner here was rejected by the California Appellate Court for the First District in *Alpha Beta, Inc. v. Superior Court* (1986) 180 Cal.App.3d 324, [Petition for review pending]. At footnote one, the Court summarized the *Lueck* decision of this Court, and applying the test to the claim, stated:

> ". . . Nahm's claim for emotional distress is not preempted under the narrow holding in *Lueck*. Her claim does not implicate the terms of her collective bargaining agreement. Whether or not her supervisors mistreated her involves no interpretation of contract terms. Hers is not a case of substituting state tort actions for discipline or grievance procedures in which conduct of an employer or an employee is alleged in violation of the agreement . . . . Rather, Nahm's claim is a straightforward state tort action for tort recovery for emotional distress caused by intentional, outrageous conduct. Recovery is based on Nahm's right, independent of contract to be free from conduct so reprehensible that no reasonable [person] in a civilized society should be expected to endure it." (180 Cal.App.3d 324.)

Thus, under either test, Buchanan's cause of action for intentional infliction of emotional distress is not preempted.

C. THE SUPERIOR COURT DID NOT ERR IN APPLYING THE HOLDING IN *GARIBALDI V. LUCKY FOOD STORES, INC.*

In denying Union Oil's motion for summary judgment on Buchanan's cause of action for intentional infliction of emotional distress, the superior court, in its order, refers not only to *Garibaldi v. Lucky Food Stores, Inc.* (1984) 726 F.2d 1367, but to the cases cited therein.

1. Petitioner's First Claim is that the Only Issue in *Garibaldi* was Removal.

In *Garibaldi,* the District Court found it had jurisdiction over the cause of action for wrongful discharge and granted removal. The Court also retained jurisdiction of the emotional distress claim presumably under the doctrine of pendent jurisdiction. Thereafter, the District Court dismissed the wrongful discharge claim on the basis of the statute of limitations and remanded the emotional distress claim to state court.

Although *Garibaldi* is a case presenting the issues of removal and remand, the Ninth Circuit held that the case turned on whether plaintiff's claims were preempted and gave the state court some guidance on this issue. Thus, *Garibaldi* discusses preemption, including the question of preemption of a state tort claim for intentional infliction of emotional distress [set forth at 726 F.2d 1367, footnote four at page 1369 and at page 1373] and cites the *Farmer* test.

2. Petitioner Misconstrues the District Court's Order Denying Removal.

Union Oil seeks to raise Judge Takasugi's Order Denying Petition for Removal of this case as a finding of preemption on Buchanan's cause of action for intentional infliction of emotional distress. The District Court was concerned only with the issues of jurisdiction and removal and made no finding that BUCHANAN'S claim was preempted.

3. Buchanan's Claims for Wrongful Termination and Intentional Infliction of Emotional Distress are Separate and Distinct Causes of Action.

Additionally, contrary to Union Oil's assertion, it does not follow that because the superior court found Buchanan's action for wrongful discharge to be preempted that Buchanan's claim for intentional infliction of emotional distress should be found to be preempted. Buchanan's emotional distress was not the result of her wrongful termination.

D. EXHAUSTION OF CONTRACTUAL REMEDIES WAS NOT REQUIRED BY BUCHANAN.

Buchanan's claims for mental distress are not covered by the language of the Agreement and therefore are not subject to the grievance procedure set forth therein. Notwithstanding the fact that the party claiming preemption has the burden of proof, Union Oil has never cited any particular section of the collective bargaining agreement which covers intentional torts by co-workers. Buchanan's

right to be free from hostility, harassment, and the infliction of emotional distress in the workplace is independent of the collective bargaining agreement, is of paramount concern to the state and is peripheral to the concerns of the Labor-Management Relations Act. (*Vaca v. Sipes* 386 U.S. 171 (1967), footnote No. 8.)

Therefore, the state court has jurisdiction to hear plaintiff's cause of action for intentional infliction of emotional distress, and it should not be dismissed on the grounds of preemption.

E. CALIFORNIA HAS NOT ESTABLISHED CONFLICTING RULES WHICH UNDERCUT NATIONAL LABOR POLICY.

Contrary to Union Oil's assertions, California has not established conflicting rules which impair national labor policy.

Union Oil cites *Friday v. Hughes Aircraft Company* (1986) 179 Cal.App.3d 947, as a case in which the same California Appellate Court that denied preemption in Buchanan's case, found in favor of preemption. Petitioner contends Friday is a case identical in facts and issues to Buchanan's case. That statement, however, is inaccurate. In *Friday*, the California Appellate Court for the Fourth District found that Friday's claims for intentional infliction of emotional distress were preempted because they were based on the physical conditions of his workplace, a matter covered in the collective bargaining agreement and would necessarily involve interpretation of the relevant sections of the agreement to determine the parties' right under it. (179 Cal.App.3d 947.)

The main thrust of Buchanan's claim, on the otherhand, is for intentional and tortious conduct perpetrated by her co-workers and is outside the scope of the collective bargaining agreement. Furthermore, unlike Friday, Buchanan's emotional distress did not arise out of the wrongful termination.

Alpha Beta, supra, additionally is distinguishable from *Friday,* and does not present a conflicting ruling. In *Alpha Beta,* the California Appellate Court for the First District found that Nahm's claims for intentional infliction of emotional distress were not preempted as they were not related to her termination, that her claims did not implicate the terms of the collective bargaining agreement and did not threaten uniformity of law governing labor contract interpretation. As in Buchanan's case, Nahm's emotional distress arose out of a campaign of harassment which accrued during her employment.

As is evident, the California courts have taken into account the individual facts of each case in making their rulings and have not established conflicting rules which threaten to impair federal labor policy.

CONCLUSION

For the foregoing reasons, Respondent, Pat J. Buchanan, respectfully requests the Court deny Union Oil's Petition for Writ of Certiorari herein.

DATED: September 12, 1986.

Respectfully submitted,

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Counsel of Record
[Admission Pending]
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PAT J. BUCHANAN

APPENDIX "1"

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

PAT J. BUCHANAN, CASE NO. 39 90 45
Plaintiff, STIPULATION

vs.

UNION OIL COMPANY OF CALIFORNIA, a California corporation; INTERNATIONAL UNION OF PETROLEUM AND INDUSTRIAL WORKERS (SIUNA AFL-CIO)), a California corporation; JIMME D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, LAWRENCE F. BADER, GARY M. MELSOPP, ROBERT B. TAYLOR, and DOES 1 through 20, inclusive,
Defendants.

The following Stipulation is entered into on the dates below indicated to be effective February 24, 1984 by Plaintiff, Pat Buchanan, and Defendant, Union Oil Company of California, through their respective attorneys:

1. Plaintiff shall voluntarily dismiss, with prejudice, the following supervisory employees of Defendant Union Oil

Company of California named in the above-entitled action: Jimmy D. Grimes, Robert E. Harke, Robert L. Graves.

2. Defendant agrees that at all times alleged in Plaintiff's First Amended Complaint, Defendants Jimmy D. Grimes, Robert E. Harke and Robert L. Graves were acting as agents on behalf of the Defendant corporation, Union Oil Company of California, and that their acts and conduct arose out of and in the course and scope of their employment with the Defendant, and that their acts, or conduct, is imputable to the Defendant corporation.

3. The parties mutually agree to cooperate with one another with respect to the oral depositions of Jimmy D. Grimes, Robert E. Harke and Robert L. Graves as provided under the provisions of California Code of Civil Procedure Section 2019.

AGREED:

DATED: March 7, 1984.

By: s/s PATRICIA HERZOG
Attorney for Plaintiff
PAT BUCHANAN

AGREED:

DATED: March 7, 1984.

By: s/s HARVEY H. KLEE
Attorney for Defendant
UNION OIL COMPANY OF CALIFORNIA

MAR 23 1984
IT IS SO ORDERED:

s/s WILLIAM SHEFFIELD
Judge of the Superior Court